STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL BANKS,

Plaintiff-Appellant,

vs

EXXONMOBIL CORPORATION, d/b/a/ WIXOM MOBIL ON THE RUN, a New York corporation; and ROBERT PEMBE,

Defendants-Appellees,

and

DEBRA SALISBURY,

Defendant.

_____/

Supreme Court No. 131036

Court of Appeals No. 257902

Oakland County Circuit Court
No. 03-049526-NO

DEFENDANTS-APPELLEES' BRIEF IN RESPONSE TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

131036

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Defendants – Appellees say "NO".

Plaintiff – Appellant says "YES".

II. Should this Court grant leave to appeal to consider the question of whether the Court of Appeals properly affirmed the trial court's grant of summary disposition where the evidence on the videotape was insufficient to establish constructive notice, where any adverse inference arising from the videotape's absence was unrelated to any material fact, and where the trial court likely considered the adverse inference when granting summary disposition?

Defendants – Appellees say "NO".

Plaintiff – Appellant says "YES".

I. COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

This appeal arises from the circuit court's proper grant of Defendant – Appellees' ExxonMobil and Robert Pemberton (hereinafter "Defendants") motion for summary disposition on Plaintiff – Appellant's (hereinafter "Plaintiff") negligence claim, and the Court of Appeals' proper affirmance of the circuit court's order. Plaintiff's negligence action was based upon Plaintiff's claim that he sustained an injury to his left eye while attempting to pump gas from a damaged pump on Defendants' premises.

A. The May 25, 2005 Incident

Debra Salsbury, former assistant manager of the Wixom ExxonMobil convenience store and gasoline station, was working the afternoon of May 25, 2005. See Deposition of Debra Salsbury at 19, 20, (attached as **Exhibit A**). A second sales associate, Kishor Poudel, was also working with Ms. Salsbury that day. Id. at 20. Ms. Salsbury recalled that the store was quite busy at the time the Plaintiff arrived. Id. at 82. She and Mr. Poudel were both operating the cash registers at the same time. Id. at 82. Mr. Poudel was operating the cash register and watching the parking lot on the side where the incident occurred that day. Id. at 101.

Plaintiff estimated that the event occurred between five and six o'clock in the evening. Deposition of Michael Banks at 23, 24, (attached as **Exhibit B**). Plaintiff pulled up to the pump and noticed that one of the three nozzles, the hose on the right – regular unleaded – was lying on the ground. Id. at 24. He attempted to hang up the hose, however the holster on the pump was broken, so he set the hose off to the side. Id. at 25. Plaintiff then selected the mid-grade, or "special", gasoline at the same pump. Id. When he attempted to pump the gas into his vehicle, the nozzle detached from the handle and gasoline sprayed into Plaintiff's face. Id at 26. Plaintiff then drove to another pump and pumped gas into his vehicle. Salsbury Dep, Ex. A, at 52-53, 55.

After pumping gas at another pump, Plaintiff entered the convenience store and went to the front of Ms. Salsbury's register. Salsbury Dep, Ex. A, at 21, 26. Plaintiff was yelling that the fuel pump should have been shut down. Ms. Salsbury smelled gasoline and noticed gasoline on Plaintiff's clothing, and immediately shut down Plaintiff's pump (pump twelve) from her register. Id. Plaintiff indicated to Ms. Salsbury that when he attempted to pump gasoline into his vehicle, he was sprayed with the gasoline. Ms. Salsbury recalled that Plaintiff was upset that he was late for a meeting and that his clothes had been ruined. Plaintiff then demanded that Ms. Salsbury accompany him to the pump for inspection. Id.

At this time, Ms. Salsbury's main concern was whether Plaintiff should seek medical attention. She inquired as to whether he had ingested any gasoline, and after much persuasion, she convinced Plaintiff to use the eye wash at the station to flush his face. Ms. Salsbury further advised Plaintiff to seek immediate medical attention at Providence hospital located near the Wixom store. Id. at 28-29.

Ms. Salsbury then accompanied Plaintiff to view pump twelve. Salsbury Dep, Ex. A, at 30. At the pump, Ms. Salsbury observed a nozzle lying on the ground. She picked up the nozzle and noticed there was a split in the rubber hose. Id. Ms. Salsbury also found there were several small dents in the stainless steel face plate that covers the front of the fuel pump. Id. at 31. Based on the kind of damage the pump sustained, Ms. Salsbury surmised that a customer had run into the pump with a vehicle. Id. at 32.

Ms. Salsbury immediately tagged the damaged pump as "out of order" and returned to the store with the Plaintiff to record his personal information. Id. at 50-51, 113. Ms. Salsbury again suggested to the Plaintiff that he seek medical treatment. Id. at 52. Plaintiff, instead, paid for the gasoline he had pumped after being sprayed, and left the Defendants' store. Id. at 53, 55.

After Plaintiff's departure, Ms. Salsbury followed company procedure and went through the emergency response list to report the incident to ExxonMobil, her manager, and other persons necessary under ExxonMobil policy. Id at 55-56. She took Polaroid pictures of the damaged pump, and removed the security video tape of that day from the security camera recorder. Id at 56. Ms. Salsbury viewed the videotape and saw that pump twelve had been in constant use throughout the day. Id at 62. The videotape did not show the damage to the pump or the injury to Plaintiff. Ms. Salsbury recalled the contents of the videotape in her deposition:

> Q. Did you actually see, in reviewing the videotape, somebody strike the pump that you circled on Salsbury Exhibit Number 3 with their car?
>
> A. No, I didn't see them strike it.

Salsbury Dep, Ex. A at 105. Ms. Salsbury also testified that she did not see the actual incident involving the Plaintiff:

> Q. Okay. In your review of the videotape did you actually see the incident occur with Mr. Banks?
>
> A. No. No, because it – **if I remember correctly, the view of the cameras with the height of the pump, it was blocked to see any – anything specific**. (emphasis supplied)
>
> Q. Okay. In regard to Mr. Banks pulling up to that pump, in your view of the videotape, you saw his car, but you can't recall what it is, pull up to that pump, pump number –
>
> A. 12 I said.
>
> Q. The one you have marked in your Exhibit Number 3?
>
> A. Um—hum. Yes. I'm sorry.
>
> Q. Okay. But you couldn't see what was happening because of the angle of the view?
>
> A. Yes.

Q. Do you recall seeing his vehicle pull away from that pump?

A. His vehicle?

Q. Right.

A. (No response.)

Q. I think you told me earlier that you said on the videotape you couldn't see what was happening, but you saw him come into the store on the videotape.

Is that because he videotapes have a number of views inside the store and out of the store?

A. I don't recall.

* * *

Q. But in regard to what you saw in the videotape, you couldn't see what actually happened with regard to the pump and Mr. Banks while he was pumping the gas.

A. Correct.

Q. You couldn't see how he got sprayed; correct?

A. Correct.

Id at 62-65. She gave the videotape and other evidence collected to her manager that day. Id at 106.

In addition to viewing the video tape of the incident, Ms. Salsbury pulled the cash register tape from the day's sales. Id at 106. Ms. Salsbury noted from the cash register tapes that the length of time between pump twelve's last use and the Plaintiff's use were within minutes of each other, showing that the damage to the pump must have occurred almost immediately before the Plaintiff arrived. Id. In fact, a review of the register tapes from May 25, 2000 shows that pump twelve was used throughout the day until this incident. At 5:12:12 p.m. the pump recorded a regular unleaded sale of $25.68, apparently functioning without incident. At 5:15:17 p.m., a

sale for Special gasoline in the amount of $0.01 was recorded. At 5:18:42 p.m., a $0.23 sale for Special gasoline was recorded. See Register Tapes, Ex. C. This 23 cent sale was the Plaintiff's attempt to pump gas. The pump was then shut down by Ms. Salsbury after the Plaintiff entered the store.

All of this evidence indicates that the pump was likely damaged following the 5:12:12 p.m. sale of regular unleaded in the amount of $25.68, possibly by the car recording the 5:15:17 p.m. sale of $0.01. Plaintiff then apparently pulled up to the pump at 5:18:42 p.m., just minutes after the damage, and attempted to use the pump. This entire course of events took place in only a six to eight minute timeframe. There was clearly not sufficient time to infer constructive notice to the Defendants.

B. The Videotape Issue

During the course of discovery, Plaintiff requested a copy of the surveillance videotape recorded by the Defendants. Defendants could not locate the videotape taken on May 25, 2000. On May 19, 2004, Plaintiff filed a motion to compel the production of the videotape. On June 23, 2004, the circuit court entered an order compelling the Defendants to produce a copy of the videotape within 21 days or alternatively, to notify both the court and Plaintiff that the videotape could not be located. On July 14, 2004, counsel for the Defendants filed Notice to the court and Plaintiff that the videotape could not be found among Defendants' records. Plaintiff then filed a Motion requesting a jury instruction of adverse inference regarding the lost tape, which was granted over Defendants' objection that the request was premature and the relief requested, i.e. an adverse inference regarding constructive notice, was not supported by the evidence of the view the video would have depicted.

After an August 18, 2004 hearing on Plaintiff's Motion, the circuit court ordered that if Defendant ExxonMobil failed to produce the videotape by August 24, 2004, the jury would be

given Michigan Civil Jury Instruction 6.01, which would state that Defendant ExxonMobil has not offered the videotape of its premises on May 25, 2000, and the jury may infer that this evidence would have been adverse to the Defendants. A written order to this effect was not entered prior to the circuit court's grant of summary disposition.

C. Procedural Background

During the same timeframe the parties were arguing over the adverse instruction, Defendants filed their motion for summary disposition on July 28, 2004, arguing that they lacked both actual and constructive notice of the dangerous condition that allegedly injured the Plaintiff. Particularly, Defendants argued that Plaintiff could present no evidence to establish that Defendants knew of the defect, and that the defect existed for a sufficient period of time so that Defendants should have known of the defect.

Plaintiff responded to Defendants' motion, and did not argue both of the alternative ways to demonstrate constructive notice as he does here. Instead, Plaintiff argued that Defendants had actual notice of the damage to the pump, and, with respect to constructive notice, argued only that the evidence established that the damage had existed for a sufficient length of time for Defendants to have discovered it. Plaintiff did not argue that the type of damage to the pump was of such a character that Defendants should have known it existed. Plaintiff raised that issue for the first time before the Court of Appeals.

On August 26, 2004, the circuit court issued its Opinion and Order granting Defendants summary disposition on Plaintiff's claim. In doing so, the circuit court described the Plaintiff's evidence it considered when reaching its conclusion:

> In response, Plaintiff cites evidence that the pump had been used twice within eight minutes of Defendant's [sic] use, that the pump was damaged when Defendant [sic] arrived and that one of the hoses was lying on the ground. Plaintiff also notes that industry standards and Defendants' employment practices require that the

> pumps be monitored. Finally, Plaintiff notes that he has prevailed in his request for an adverse inference jury instruction based on Defendants' failure to produce surveillance tapes of the incident. This evidence, Plaintiff argues, is sufficient to establish constructive notice. In addition, the sale that occurred three minutes before Plaintiff used the pump, combined with the fact that the hose was on the ground when Plaintiff arrived, was sufficient to establish that Defendants had actual notice. This was because the prior sale was for only one cent, which informed the Defendants that there was "an issue" with the pump.
>
> See Opinion and Order, Ex. D.

The circuit court went on to find that "this evidence is insufficient to establish actual notice, as it is not reasonable to expect Defendants to infer from a one-cent sale that the pump was dangerous to other customers." Id. Further, the court held "nor is the evidence sufficient to establish constructive notice, even when viewed in the light most favorable to Plaintiff." Id.

Plaintiff appealed, asserting that the circuit court erred in granting Defendants summary disposition, and raising two issues relevant to its application for leave to appeal to this Court.[1] First, Plaintiff argued that the circuit court erred in granting Defendants summary disposition because there was sufficient evidence in the record from which the trier of fact could conclude that Defendants had constructive knowledge of the condition which allegedly caused Plaintiff's injury. Plaintiff based this assertion on its claim that constructive knowledge could be shown either by evidence that the alleged condition had existed for a sufficient time so as to put Defendants on notice, or that the alleged condition "was of such a character" that Defendants should have had knowledge of it. Plaintiff claimed that the trial court erred by considering only whether there was sufficient evidence to show constructive knowledge by Defendants based on

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[1] Plaintiff also asserted that the circuit court erred by granting summary disposition because Plaintiff's expert's affidavit presented an alternative theory of liability. The Court of Appeals found no merit to this argument, and Plaintiff has not raised this issue in its application for leave to appeal.

the "length of time" test, while ignoring the issue of whether there was sufficient evidence to show constructive knowledge by the "of such a character" test. In making this argument, Plaintiff ignored the fact that he had ***never raised*** this issue before the circuit court.

Second, Plaintiff argued that the circuit court erred in granting summary disposition to Defendants, because the circuit court had previously ruled that Plaintiff was entitled to an adverse inference against Defendants before the jury, due to Defendants' inability to produce the video surveillance tape. Plaintiff argued that this adverse inference was sufficient to create a genuine issue of material fact for trial.

The Court of Appeals affirmed the circuit court's grant of summary disposition by written opinion dated March 16, 2006 (attached as **Exhibit E**). The Court of Appeals held that there was insufficient evidence in the record to create a genuine issue of material fact as to whether Defendants had constructive notice of the alleged dangerous condition. Specifically, the Court of Appeals found that neither the eight minute time frame nor the one cent sale was sufficient evidence to create an issue of material fact of constructive notice:

> In this case, the trial court properly concluded that the evidence would allow a jury to infer that the hose that caused plaintiff's injuries was damaged, at most, approximately eight minutes before the plaintiff used the pump. We agree that this amount of time is insufficient to provide that defendants should have discovered and rectified the hazard. The hazard did not exist for such a length of time that defendants should have had constructive knowledge of it.
>
> Plaintiff argues that the trial court failed to consider that the preceding sale on the same was for only one cent, which should have given defendants notice that the pump was damaged. It is apparent that the trial court took this fact into account because it referred to it in its decision. The one-cent sale occurred less than five minutes before plaintiff used the pump. We agree with the trial court, however, that a one-cent sale was not sufficient to provide notice that there was something immediately wrong with the pump that required immediate action to either turn off or promptly inspect the pump.

Opinion, Ex. E, at 2.

The Court of Appeals also rejected Plaintiff's contention that the adverse inference related to the video tape created a genuine issue of material fact, because the video tape would, at most, have shown whether the pump was damaged – *not* whether Defendants had constructive notice of a dangerous condition:

> At oral argument before the trial court, plaintiff's counsel argued that the videotape would have shown that another driver hit the pump before plaintiff used it. While such evidence would have been relevant to show that the fuel pump was damaged, and while defendant's failure to product [sic] the videotape could allow a jury to draw an adverse inference against defendants with regard to the question whether the pump was damaged, it does not permit an inference that defendants had actual or constructive knowledge of the defect.

Opinion, Ex. E, at 3 (footnote omitted).

II. LEGAL ARGUMENT

A. Standard of Review

An application for leave to appeal to this Court "must show that . . . the issue involves legal principles of major significance to the state's jurisprudence," or that the Court of Appeals' "decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. . . ." MCR 7.302(B)(3) and (5). Plaintiff does not satisfy either ground. The Court of Appeals disposed of this case on well-established Michigan law, and there is no need for this Court to review the Court of Appeals unpublished opinion.

This Court reviews the grant of summary disposition de novo. Spiek v Department of Transportation, 456 Mich 331, 337 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. St Paul Fire & Green Ins Co v Quintana, 165 Mich App 719, 722; 409 NW2d 60 (1988). In evaluating a motion for summary disposition, a trial court must consider only substantively admissible evidence contained in the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties.

Although the evidence must be considered in the light most favorable to the non-moving party, Maiden v Rozwood, 461 Mich 109, 120-121; 597 NW2d 817 (1999), that party has the burden of showing that a genuine issue of material fact exists. Tope v Hower, 179 Mich App 91, 98; 445 NW2d 452 (1989).

To meet this burden, the opposing party cannot rely on mere allegations or denials, but must set forth specific facts showing that there is a triable issue. Department of Social Services v Casualty Ins Co, 177 Mich App 440, 445; 443 NW2d 420 (1989) (emphasis added). A mere possibility that the claim might be supported by evidence produced at trial is insufficient to successfully oppose a motion under MCR 2.116(C)(10). Maiden v Rozwood, 461 Mich 109 at 121. Plaintiff has not met his burden of showing the evidence sufficient to create a triable issue in this case, and the Circuit Court and Court of Appeals agreed.

B. The Defendants Did Not Have Actual or Constructive Notice That the Fuel Pump Was Damaged

As Plaintiff has pointed out, the central question in this case concerns the issue of notice. The circuit court correctly found in its Opinion and Order that the Defendants had neither actual nor constructive notice of the damaged gasoline pump on its premises.

Under Michigan law, a property owner is not an insurer of the safety of invitees. Williams v Cunningham Drug Stores, Inc, 429 Mich 495, 500 (1988). His duty is only to exercise reasonable care for their protection. Id at 500. If an unsafe condition arises, the shop owner is liable only if the owner actually knows of the condition, "or the condition is of such a character or has existed a sufficient length of time that he should have knowledge of it." Berryman v K Mart Corp, 193 Mich App 88, 92 (1992) *quoting* Serinto v Borman Food Stores, 380 Mich 637, 640-641 (1968).

Plaintiff argues that the Court of Appeals and the circuit court erred in finding Defendants had no constructive knowledge of the damaged pump, because neither the circuit court nor the Court of Appeals properly addressed the two alternative ways constructive knowledge can be established, as stated in Berryman. The Court of Appeals and the circuit court, however, properly found that, as a matter of law, Defendants did not reasonably have constructive notice of the dangerous condition.

1. Plaintiff has waived the issue of whether constructive notice was established by the character of the damaged fuel pump

Although two alternative ways to establish constructive notice may exist, id, courts are not bound to evaluate both possibilities where the parties do not argue the presence of both possibilities. See, e.g., Serinto v Borman Food Stores, 380 Mich 673 (1968); Whitmore v Sears, Roebuck & Co, 89 Mich App 3 (1979); Bunch v Long John Silvers, Inc, 878 FSupp 1044 (1995)(applying Michigan law). Plaintiff ***did not argue*** to the circuit court in response to Defendants' motion for summary disposition that the character of the damaged fuel pump was of such a nature that constructive notice should be found, and therefore has waived this argument on appeal. Alan Custom Homes, Inc v Krol, 256 Mich App 505, 512-13 (2003); Hyde v Univ. of Michigan Board of Regents, 226 Mich App 511, 525 (1997). As a result, Plaintiff cannot claim that it was error for the Court of Appeals to have failed to consider this issue.[2] Under either alternative method, however, Plaintiff still fails to establish sufficient evidence to create a prima facie case that Defendants had constructive notice of the damaged fuel pump.

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[2] Plaintiff has not established that the Court of Appeals did, in fact, fail to consider this issue. Its opinion plainly indicates that it was aware of both methods of showing constructive notice. See Ex. D, at 2 (quoting this Court's opinion in *Clark v Kmart Corp*, 465 Mich 416, 419 (2001), which contains both methods of proof of constructive notice).

2. Plaintiff has failed to establish a question of material fact exists that the character of the defect was sufficient to put the Defendants on notice of its existence.

Simply because two alternative ways to demonstrate constructive notice exist, courts are not required to consider both possibilities where arguments and authority in favor of one are not presented. It is not the court's job to discover and rationalize the basis for a party's claim. See In Re Toler, 193 Mich App 474, 477 (1992). Several courts have cited the language Plaintiff quotes, identifying the two alternate ways to demonstrate constructive notice, yet they only analyze and base their opinion on one issue – whether the dangerous condition existed for a considerable time to impute knowledge to the Defendant. See, e.g., Serinto v Borman Food Stores, 380 Mich 637 (1968), Whitmore v Sears, Roebuck & Co, 89 Mich App 3 (1979), Bunch v Long John Silvers, Inc, 878 FSupp 1044 (1995) (applying Michigan law). Therefore, even if Plaintiff is correct that the Court of Appeals failed to address this alternative means of showing constructive notice, this failure is not reversible error, particularly where the Plaintiff failed to raise this issue before the circuit court.

However, even if the Court were to consider Plaintiff's new argument, the damage to the fuel pump is not of the character which should reasonably have put the Defendants on notice of its existence. Plaintiff argues that the Defendants' employees' duties consisted of constantly monitoring the fuel pumps. See Appellant's Brief at 12-14. Plaintiff goes one step further, stating that because Defendants' employees "should have been monitoring the pumps" then it is clear that Defendants "should have known of a potential danger" associated with the damage caused to fuel pump twelve. Appellant's Brief at 16. Plaintiff's conclusion, however, does not flow logically from the facts presented.

First, Plaintiff mischaracterizes the Defendants' employees' duties. Plaintiff attempts to impose the duty of constant, one hundred percent of the time surveillance of the fuel pumps by Defendants' employees. Plaintiff, however, quotes Ms. Salsbury's testimony, which only demonstrates that the Defendants' employees had several duties to tend to at the same time, one of which was to watch the parking lot "as best as [they] could". Salsbury Dep, Ex. A at 102, 103. Ms. Salsbury testified as to what her definition of "constantly watching" the parking lot meant, clearly differing from the duty Plaintiff is now attempting to impose.

> A. It was our jobs. It was our jobs to watch that parking lot to make sure we weren't getting drive-offs and it was our job to wait on the customer base in the store as well.
>
> Q. So were you supposed to **constantly watch** the parking lot?
>
> A. **We were to watch the parking lot as each pump was being used**, and then once it was turned on, **between waiting on customers it was your responsibility to glance out there and make sure that person was still there**. There having been incidents in the past where a customer would just lay the nozzle on the ground instead of hanging it up, which would indicate that the pump was still in use.

Salsbury Dep, Ex. A at 97-98 (emphasis added).

Further, the National Fire Protection Association (NFPA) standards Plaintiff quotes do not require a constant surveillance of the fuel pump area. Indeed, all NFPA standard 8-4.3 requires is "to supervise, observe, and control the dispensing of Class 1 liquids." Plaintiff has presented no testimony or evidence that the Defendants' employees were not acting appropriately or within their duties on May 25, 2000. Indeed, Plaintiff's own purported expert states that "These NFPA Standards are in conformity with the requirements of defendant, ExxonMobil employees as indicated in the deposition testimony of Debra Salsbury..." Greene Affidavit, ¶ 16 attached as **Exhibit F**. Plaintiff has not demonstrated that Defendants' employees on duty that

day, Ms. Salsbury and Mr. Poudel, were not monitoring the pumps in accordance with their duties.

Moreover, Plaintiff has not established that even if Defendants' employees were, as Plaintiff defines it, "constantly" monitoring the pumps, they should have known of a potential danger. Plaintiff attempts to exploit the Defendants' experience with "drive-offs", claiming Mr. Poudel should have been extra attentive to the fact a pump nozzle was lying on the ground. Plaintiff, however, has provided no evidence that the pump nozzle lying on the ground near pump twelve was in Mr. Poudel's line of vision. While Mr. Poudel may have been monitoring the parking lot for "drive-offs", he may not have been able to see the regular gasoline nozzle on the ground.

Further, Mr. Poudel was likely not alerted to the fact that the gasoline nozzle was not hung correctly in its holster at his register. Mr. Pemberton explained the mechanics of the fuel pumps in his affidavit:

> "The pumps located at the ExxonMobil Wixom facility can be turned off by the on/off lever that the nozzle sits in... ."
>
> Pemberton Affidavit, ¶ 4, attached as **Exhibit G**.

Ms. Salsbury testified that when a drive-off occurred, the customer stealing gasoline would generally lay the nozzle on the ground and not shut off the pump switch, indicating to the employee on the register that the pump was being used. Salsbury Dep, Ex. A at 98-100. This fact, that the pump was still turned on, and no vehicle remained at the pump, is what indicated a drive-off had occurred to ExxonMobil employees. Id.

Here, the facts indicate that it was the regular-unleaded gasoline nozzle that was lying on the ground. The cash register tapes point out that a normal sale of $25.68 occurred approximately six to eight minutes prior to Plaintiff's arrival from that same regular-unleaded

nozzle. See Register Tapes, attached as **Exhibit C**. Thus, following the sale, the pump had been turned off. The following one cent sale, and Plaintiff's sale, were both for the special gasoline. Id. Thus, for pump twelve, during the six to eight minutes in question, the pump was turned off for the nozzle lying on the ground, and would not have indicated anything out of the ordinary, such as a drive-off, to the employees inside the station.

Plaintiff has presented no evidence that Defendants' employees failed to properly monitor the pumps, particularly pump twelve, in accordance with their job responsibilities. Moreover, Plaintiff has failed to present any evidence that if Defendants had been monitoring the pumps, "constantly," as Plaintiff describes it, that Defendants should have known of a potential danger associated with the damage caused to pump twelve. Plaintiff has not presented sufficient evidence to create a genuine issue of material fact that the character of the defect alone would raise a question of the Defendants' knowledge. Plaintiff has failed to demonstrate a prima facie case of Defendants' constructive knowledge, and both the Court of Appeals and the circuit court were proper in dismissing Plaintiff's claims.

3. The Court of Appeals properly upheld the circuit court's finding that as a matter of law the alleged defect in the fuel pump did not exist a sufficient length of time to charge Defendants with constructive notice.

Plaintiff takes issue with the resolution of the constructive notice issue as a matter of law by the Court of Appeals and the circuit court. Plaintiff claims that constructive notice is ordinarily an issue for the trier of fact to determine. Appellant's Brief at 18-19. In all cases, however, there is a threshold of evidence that a Plaintiff must establish to create a prima facie case. Even with constructive notice, there are cases where a defendant is entitled to judgment as a matter of law because proofs are lacking or insufficient to draw an inference of constructive notice. See Burgdorf v Holme-Shaw, 356 Mich 45, 50 (1959). Defendants discussed this

threshold at length in their summary disposition brief, and the circuit court properly followed this law when it found the Plaintiff's evidence was insufficient to create a question of fact for the jury. The circuit court properly found that for this kind of damage, a six to eight minute timeframe was, as a matter of law, insufficient to infer constructive notice, and the Court of Appeals properly upheld this finding.

To establish a prima facie case of constructive notice, the Plaintiff must present enough evidence to "take the case out of the realm of conjecture" and place it in "the field of legitimate inferences from established facts." Whitmore, 89 Mich App at 9. "Where there is no evidence to show that the condition had existed for a **considerable time**, a directed verdict in favor of the storekeeper is proper." Id at 8 (emphasis added). See also Stephens v Kroger Company of Michigan, 2002 WL 1999761, *1 (Mich App 2002) (unpublished and attached as **Exhibit H**) ("where there is no evidence to show that the dangerous condition existed for a considerable amount of time, the plaintiff will be unable to establish a prima facie case and summary disposition is, therefore, appropriate"). Here, as the circuit court held, "the evidence is [in]sufficient to establish constructive notice, even when viewed in the light most favorable to Plaintiff." See Opinion and Order at 2, Ex. D.

The evidence Plaintiff relies on here and in his response to Defendants' motion for summary disposition in the circuit court does not take the case out of the realm of conjecture or provide any evidence that the condition existed for a considerable time. The condition existed at most for a period of six to eight minutes prior to Plaintiff's use of the pump. As a matter of law, this is an insufficient amount of time from which the trier of fact could have found that Defendants had constructive notice of the pump's condition. See Page v Metro Skate, Inc, 2003 WL 1861483 (Mich App 2003), *2 n 2 (unpublished and attached as **Exhibit I**) (record

supported a finding that, at most, roller skate on which plaintiff claimed she fell had been on the floor of defendant's rink for ten minutes before the injury occurred, and this amount of time was insufficient, as a matter of law, to established constructive notice).

Plaintiff relies on evidence derived from the cash register tape pulled by Ms. Salsbury following the incident. A review of the cash register tapes from May 25, 2000 shows that only three minutes before Plaintiff attempted to use pump twelve, another customer turned the same pump on and a sale of one cent was recorded. See Register Tape, Ex. C. Plaintiff inaccurately argues that the one cent sale would be conveyed electronically to the employees working in the store, and the sale should have provided information to the Defendants' employees that "something was amiss with respect to this pump." Appellant's Brief at 17. Defendant Robert Pemberton, the station manager with over fifteen years seniority at ExxonMobil, contradicts Plaintiff's argument in his affidavit, and demonstrates why Plaintiff's argument fails in the face of the undisputed facts:

> 3. In my experience, gasoline pump sales of .01 and/or those of small amounts of .10 or less are not an indication of any problems with the pump involved. **When a .01 sale happens the Sales Associate would have no reason to notice**, unless he or she purposefully pushed the pump number and then the pump key at the register to inquire as to the amount of the sale.
>
> * * *
>
> 5. ... The Dresser-Wayne registers used at the facility at the time of the incident had two rows of eight display boxes... . Each individual box would contain one or two symbols, showing whether that particular pump was in use, and would sound different tones to aid the Sales Associate running the registers. There was no difference in the tone for a completed .01 sale and any other dollar amount. If the .01 sale was complete, the pump display box would display a "$" symbol, to indicate that money was owed by the customer. If it was incomplete, the pump display box would simply show the pump was in use.

> 6. The Sales Associate would be able to view the pump display box and see that the pump was in use, or that money is owed **but would not know the amount owed** unless the Sales Associate purposefully hit the pump number and then the pump key on the register. This was not generally done until the customer came in to pay for the gas.

See Pemberton Affidavit, Ex. G (emphasis added). Further, Mr. Pemberton testified that the display boxes on the register can store up to two sales at the same time. Id at ¶ 7. Thus, according to Mr. Pemberton's undisputed description of how the registers worked, the one cent sale and Plaintiff's subsequent .23 cent sale were both recorded in the register without displaying the amount of either sale to the employees inside the store. Defendants' employees would have had no knowledge that a one cent sale had occurred on pump twelve. Defendants would hardly have been put on notice that "something was amiss" with respect to pump twelve.

Further, even if the employees inside Defendants' store were aware that a one cent sale had been made, that information would not alert them that a problem may exist. Mr. Pemberton explains there are several normal scenarios which could yield a one cent sale:

> 4. A small gasoline sale of this type has in the past indicated one of the following scenarios:
>
> - A customer attempts to start pumping fuel when the cashier has not authorized the pump.
> - A customer starts the pump and it registers .01 to .03 without the customer having squeezed the nozzle. The pumps located at the ExxonMobil Wixom facility can be turned off by the on/off lever that the nozzle sits in and if this lever is shut off and then the nozzle squeezed afterwards, gas will release from the nozzle in the amount of about .01. Occasionally, the next customer to start the pump will see .01 or a little more (up to .03) register and not wishing to pay for this, will shut the pump lever off.
> - The underground storage tank has run out of fuel and the nozzle will no longer dispense the product.
> - The pump fuel filter is clogged and needs to be replaced. The fuel product then flows very slow and the customer will shut off the pump.

See Pemberton Affidavit, Ex. G. Thus, even if an employee noticed a one cent sale on pump twelve, Defendants would not have been alerted to a possible problem with the pump.

Plaintiff attempted to bolster his flawed and inaccurate argument by submitting the affidavit of George J. Green. Mr. Green, who has never inspected either the type of gasoline pump at the Defendants' facility or the actual pump at the facility, and has never inspected the cash register system at ExxonMobil, purports to know that the Defendants' "employees would have known immediately that one cent (1¢) worth of gas was pumped from the special hose on pump number 12, which should have generated an inquiry by Exxon Mobil employees." See Greene Affidavit, ¶ 9. As we see from Mr. Pemberton's undisputed testimony, contrary to Plaintiff's purported expert's view, a one cent sale at Defendants' facility ***would not*** be known immediately to Defendants' employees in the store, and would not have generated an inquiry as to the status of the pump. Thus, Plaintiff's expert's conclusion, that "ExxonMobil employees were on notice of a problem with pump number 12, three to five minutes before Mr. Banks used the pump" is simply not accurate. Plaintiff has presented no evidence that Defendants "should have known" of the damage to pump twelve, and has presented no evidence that the damage existed for a "considerable length of time." The trial court properly ignored the Green affidavit.[3]

The Plaintiff has failed to present sufficient evidence that would create a question of material fact that the damage to the pump was of such a character or existed for a considerable length of time that Defendants should have known of its existence. Thus, the Court of Appeals was correct to uphold the circuit court's grant of summary disposition in favor of Defendants.

C. The Court of Appeals Did Not Err in Affirming the Circuit Court's Grant of Summary Disposition Where the Evidence on

[3] Although discussing the Green affidavit in the context of an issue not raised by Plaintiff in its application for leave to appeal, the Court of Appeals properly noted that Mr. Green "apparently never inspected the pump." Opinion, Ex. E at 3.

the Videotape Was Insufficient to Establish Constructive Notice and Where the Court Likely Considered the Adverse Inference When Granting Summary Disposition

The Court of Appeals did not err in upholding the circuit court's grant of Defendants' motion for summary disposition, despite Plaintiff's claim he is entitled to an adverse inference under Michigan Civil Jury Instruction 6.01, for several reasons. First, Plaintiff has not cited any authority demonstrating that the adverse inference rule applies to the consideration of summary disposition motions. See Pica-Kras v Costco Wholesale, Inc, 2004 WL 1119110, *3 (Mich App 2004) (unpublished and attached as **Exhibit J**) (rejecting plaintiff's attempt to apply the adverse inference rule in a premises liability action where plaintiff failed to cite any authority for this proposition). Courts will not search for authority to support a party's position on appeal. LME v ARS, 261 Mich App 273, 286-87 (2004); Staff v Johnson, 242 Mich App 521, 529 (2000). Plaintiff has failed to present any authority that an adverse inference instruction is appropriately considered in determining whether summary disposition should be granted and this Court should therefore decline to disturb the circuit court's grant of summary disposition to Defendants.

Second, as the Court of Appeals correctly held, even if Plaintiff is entitled to such an adverse inference, the evidence on the video tape does not concern a genuine issue of material fact, and therefore, the adverse inference is immaterial to Defendants' motion for summary disposition:

> At oral argument before the trial court, plaintiff's counsel argued that the videotape would have shown that another driver hit the pump before plaintiff used it. While such evidence would have been relevant to show that the fuel pump was damaged, and while defendants' failure to product [sic] the videotape could allow a jury to draw an adverse inference against defendants with regard to the question whether the pump was damaged, it does not permit an inference that defendants had actual or constructive knowledge of the defect.

Opinion, Ex. E at 3 (footnote omitted).

The record supports the holdings of the Court of Appeals and the circuit court. The issue to be determined is one of notice, actual or constructive. As Ms. Salsbury testified, the videotape did not show how the damage to the gasoline pump occurred, nor did it show Plaintiff's injury. Salsbury Dep, Ex. A at 62-65; 105. The videotape did not show what occurred at pump twelve because of the angle of the view. Id. Nothing in the videotape would put Defendants on constructive notice of the damage to the pump.

Moreover, even if the video showed that that pump twelve was damaged just minutes before Plaintiff's arrival and shows a pump handle lying on the ground, Plaintiff has presented no testimony or other evidence that Defendants' employees were actually watching the video at the time of the accident, or that they should have been watching the video at the time of the accident. Plaintiff has not claimed that Defendants' employees had a duty to monitor the security video at all times. Thus, even if the video captured the accident occurring, it does not present any evidence where the trier of fact could infer Defendants had notice or should have known of the damage.

The holding of the Court of Appeals is in accord with Michigan law. Even if an adverse inference is applicable to a motion for summary disposition, it is axiomatic that it cannot have a bearing on a motion for summary disposition where the issue to which the adverse inference pertains ***is not an issue of material fact***. Plaintiff has not established that, if the inference is given for purposes of summary disposition, that the inference would be sufficient on the basis of the record to create an issue of material fact that would avoid summary disposition.

This analysis is illustrated by Boss v Kettering University, 2004 WL 1752961 (Mich App 2004) (unpublished and attached as **Exhibit K**). There, the plaintiff brought suit against his former employer under the Persons with Disabilities Civil Rights Act (PWDCRA), alleging that

he was discriminated against, retaliated against, and harassed for exercising his rights under the PWDCRA, and that he was constructively discharged after requesting accommodation for his disabilities in 1998. In his response to the defendant's motion for summary disposition, the plaintiff noted that the defendant had failed to produce plaintiff's employment records for the period of July 1988 through November 1997. Id. at *2 n 1. The plaintiff requested that the trial court "consider Defendant's obvious spoliation of evidence" when ruling on defendant's motion for summary disposition, asserting that the failure to produce these records entitled plaintiff to the inference that these records contained evidence adverse to the defendant. Id. The trial court did not address this issue in granting defendant's motion for summary disposition. The Court of Appeals rejected plaintiff's request that it take into account this adverse inference in reviewing the trial court's grant of the motion for summary disposition, because any adverse inference drawn from the failure to produce these records did not pertain to a genuine issue of material fact:

> [T]he employment records of which plaintiff complains predate his 1998 request for accommodation. And because retaliation and harassment claims, by their very nature, are concerned with adverse employment actions that occur *after* a plaintiff engages in a protected activity, we find that it is unnecessary to address this issue when reviewing the trial court's grant of summary disposition in favor of defendant.

Id. (emphasis in original). See also Trupiano v Cully, 349 Mich 568, 570 (1957) (a presumption against one who intentionally destroys evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof).

Furthermore, it is not obvious from the circuit court's opinion that it did not give Plaintiff his requested inference, and yet still found that there was not enough evidence to create a question of fact as to constructive notice. The circuit court certainly acknowledged Plaintiff's argument: "...Plaintiff notes that he has prevailed in his request for an adverse inference jury

instruction based on Defendants' failure to produce surveillance tapes of the incident. This evidence, Plaintiff argues, is sufficient to establish constructive notice." Opinion and Order at 2, Ex. D. The circuit court went on to find that "nor is the evidence sufficient to establish constructive notice, **even when viewed in the light most favorable to Plaintiff**." Id (emphasis added). Taking the circuit court at its word, it likely considered the inference, and still found the evidence presented to be insufficient. It is clear the videotape does not present any evidence that should have put the Defendants on notice of the damage to the pump, and even so, Defendants had no duty to monitor the videotape. Certainly, Plaintiff has failed to establish sufficient evidence to create a material issue of fact in this Court also. The circuit court did not err in granting summary disposition in favor of Defendants on Plaintiff's claim due to lack evidence of constructive notice, and the Court of Appeals properly affirmed.

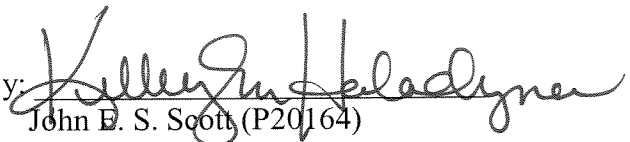
III. CONCLUSION

The Court of Appeals did not err in upholding the circuit court's grant of Defendants' Motion for Summary Disposition. Plaintiff has not presented sufficient evidence to create a genuine issue of material fact that Defendants should have known of the defect and, thus, the potential danger associated with fuel pump twelve. Therefore, Plaintiff has failed to show the existence of an issue involves legal principles of major significance to the state's jurisprudence, or that the Court of Appeals' decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

As a result, this Court should deny Plaintiff's application for leave to appeal.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

By: 

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